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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN LEADING BUSINESS CORPORATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Petitioner and respondent have consented to the filing of this brief. Respondent has filed with the Clerk a general consent to all briefs *amicus curiae*. Petitioner's letter of consent is being filed separately herewith.[1]

INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae*[2] are leading manufacturing, energy, transportation, retail, pharmaceutical and financial services companies engaged in commerce throughout the United States and the world. In this era of expansive tort litigation against corporations and even entire industries, *amici* have all defended against lawsuits seeking millions and even billions of dollars in jury-imposed punitive damages. Much of this litigation takes place in federal courts exercising diversity or federal question jurisdiction. This Court's answer to the question under review – "What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?" – will thus implicate *amici*'s interests both directly and vitally.

SUMMARY OF ARGUMENT

Amici believe that to be meaningful and effective, appellate review of a trial court's ruling on the constitutionality of

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[1] No counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici curiae* made any monetary contribution to its preparation or submission.

[2] American Home Products Corp., Ashland Inc., Caterpillar, Inc., Chevron Corporation, Connecticut General Life Insurance Co., Corning Incorporated, CSX Corporation, CSX Transportation, Inc., E. I. du Pont de Nemours & Co., Eastman Chemical Company, Exxon Mobil Corporation, General Motors Corp., The Goodyear Tire & Rubber Company, Halliburton Co., Johnson & Johnson, Kmart Corporation, Merck & Co., Inc., Minnesota Mining & Mfg. Co., New York Life Insurance Co., Pfizer Inc., PPG Industries, Inc., Reliant Energy, Inc., Shell Oil Company.

jury-imposed punitive damages must be non-deferential. New and important scientific research on punitive damages decisionmaking strongly reinforces this conclusion. In particular, recent empirical studies by leading scholars in the fields of law, economics and cognitive psychology – which collectively report on the deliberations of over 8000 mock jurors and 600 mock juries in controlled experiments designed to investigate the way juries determine punitive damages – show that even conscientious and well-intentioned juries produce systematically erratic and unpredictable awards.

The results of this newly published research are both striking and sobering. Among the major findings:

- While jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (*e.g.*, a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable.
- Contrary to commonly-held belief, deliberation by groups of jurors does not moderate the unpredictability of punitive awards, but exacerbates such unpredictability, with deliberating juries returning consistently higher and more variable awards than jurors individually.
- Juries assessing punitive damages will not and cannot apply standard economic deterrence theories, even when specifically instructed on how to do so.
- Juries assessing punitive damages impose significantly varying awards in response to inappropriate factors, including the amount requested in argument by plaintiffs' counsel and bias in favor of local plaintiffs.

- Juries assessing punitive damages exhibit both hindsight bias and irrational attitudes towards risk, for example awarding higher punitive damages against defendants who conduct cost/benefit analyses than against those who do not.

Importantly, these findings do not imply that jurors on the whole are not conscientious, intelligent, or properly motivated. Rather, they show that in the context of punitive damage decisions, juries return erratic and unpredictable dollar awards because of natural features of human cognition. Juries assessing punitive damages as one-time decisionmakers in isolated cases have no ready frame of reference for translating a desire to punish blameworthy conduct into dollar punishment. As a consequence, different juries will assess widely divergent dollar punishment for identical conduct against identical defendants in identical cases. And such decisions are distinctively susceptible to a variety of common cognitive biases, all of which the behavioral literature has observed in other decisionmaking contexts. Perhaps these points should come as no surprise. But whether surprising or not, the inescapable conclusion of this growing body of scientific literature is that dollar awards imposed by juries in isolated punitive damage cases do not reflect – and cannot be expected to reflect – commonly shared values or objectives about either retribution or deterrence. Rather, the studies show, dollar awards are essentially arbitrary.

These findings have important implications for the question under review in this case. They confirm beyond dispute the critical importance of judicial review of jury-imposed punitive damage awards, a fundamental procedural safeguard emphasized in both *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). More importantly, the findings make plain that vindication of the core due process concerns elaborated

in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) – fair notice of potential punishment and evenhanded treatment of similarly situated parties – will turn as a practical matter on the extent to which reviewing courts apply the *BMW* "guideposts" for constitutional review of punitive damages in consistent and predictable fashion.

All of this counsels for adoption of a non-deferential standard of appellate review. The *BMW* guideposts call for independent judicial analysis of the constitutionality of punitive damage awards in light of the reprehensibility of the defendant's misconduct in relation to other types of misconduct, the reasonableness of the size of the award in relation to the compensatory damages, and the reasonableness of the size of the award in relation to other potential civil or criminal sanctions. 517 U.S. at 574-86. As *BMW* itself illustrates, the jury's dollar award is only the starting point of the evaluation. Much of the analysis turns on factors not before the jury at all. While federal district courts are certainly competent to undertake such analysis in the first instance, consistency and predictability of their ultimate conclusions regarding the magnitude of permissible punishment – the very due process interest *BMW* seeks to protect – will come only with the development of a body of appellate precedents enabling consistent application of the *BMW* guideposts at the trial court level. That in turn requires non-deferential appellate review of trial court constitutional determinations.

Amici do not in this brief advocate any particular doctrinal formulation of the standard of appellate review. Our point is simply that a non-deferential standard – however the Court may choose to articulate it – is necessary to bring about consistency and predictability in punitive awards. Just as we cannot expect juries to achieve such consistency and predictability on their own, we cannot reasonably expect trial courts to achieve consistency and predictability in enforcing due process limits without a meaningful body of appellate

precedents to guide their interpretation and application of the *BMW* guideposts.

ARGUMENT

I. JURY-DETERMINED PUNITIVE DAMAGES ARE INHERENTLY ERRATIC AND UNPREDICTABLE

The observation that punitive damages are erratic and unpredictable is not new. Each passing year brings reports of jury-imposed punitive awards of staggering proportions. In 1999, for example, a California jury returned a $4.8 billion punitive damage verdict against General Motors in a personal injury case. Other juries assessed punitive damages ranging from $20 million to more than $200 million in at least a dozen additional cases. *Developments in the Law – The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1783 (2000).

In the face of such reports, defenders of punitive damages are quick to point out that trial and appellate courts frequently reverse or reduce such awards.[3] Available survey evidence suggests this may well be so, at least in the aggregate. A 1986 sampling of federal product liability cases by Professor William Landes and Judge Richard Posner reported that federal appellate courts reversed or sharply reduced the awards in nine of thirteen cases in which punitive damages were appealed, a reversal rate (seventy percent) more than double the reversal rate for plaintiff verdicts not

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[3] *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15, 40-44 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1115 (1996). Notably, the trial court in the General Motors case referenced above declined to reduce the punitive damages below $1.09 billion, a still grossly excessive amount now subject to review only on appeal. *See* Margaret Cronin Fisk, *The Biggest Jury Verdict of 1999*, National Law Journal, Feb. 28, 2000, at A1.

including punitive damages.[4] Surveys by the Rand Corporation (1987) and the General Accounting Office (1989) likewise reported high rates of reversal or reduction, especially among larger awards.[5] And a 1993 Washington Legal Foundation study of decisions reported on LEXIS and WESTLAW found that fifty-four percent of jury punitive damage awards were reversed, reduced or modified.[6]

These surveys highlight the critical extent to which the tort system relies on judicial review by both trial and appellate courts to counteract erratic and unpredictable punitive assessments by juries. *See Honda*, 512 U.S. at 433 n.11 (survey evidence of this type "supports the importance of judicial review of the size of punitive damages awards"). The high rate of disagreement between judges and juries on punitive damages stands in sharp contrast to the much lower rates of disagreement (typically around twenty percent) reported in the literature on jury verdicts generally.[7] The survey data thus reinforce the need for non-deferential review of punitive damage awards at both the trial and appellate levels.

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[4] *See* William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Reg. 33 (Sept.-Oct. 1986).

[5] *See* Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings*, Report No. 3311-ICJ, Institute for Civil Justice (Rand Corporation 1987); U.S. General Accounting Office, *Product Liability Verdicts and Case Resolutions in Five States*, GAO/HRD-89-90 (Sept. 1989).

[6] *See* Brief of the Washington Legal Foundation as *Amicus Curiae* in support of petitioner in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

[7] *See, e.g.*, Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883 (1993); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992).

A. Even When Jurors Can Agree on the Relative Blameworthiness of a Defendant's Conduct, Monetary Awards Are Arbitrary and Unpredictable.

Recent empirical studies on punitive damages decisionmaking confirm what the survey data show. Published in leading law reviews and peer-reviewed behavioral science journals, these studies shed new and important light on *how* juries go about setting punitive damage amounts. Designed and conducted by preeminent scholars in the fields of behavioral analysis of law (Professor Cass R. Sunstein of the University of Chicago), cognitive psychology (Professors Daniel Kahneman of Princeton University, David A. Schkade of the University of Texas, and John W. Payne of Duke University), jury decisionmaking (Professor Reid Hastie of the University of Colorado), and behavioral economics (Professor W. Kip Viscusi of Harvard University), the studies report the results of large scale mock jury simulations involving, in total, over 8000 mock jurors and 600 mock juries.[8] In controlled experiments designed to simulate actual punitive damages decisionmaking, the researchers evaluated the quality and coherence of the jurors' decisionmaking processes.

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[8] As disclosed in the various published studies, *amicus curiae* Exxon Mobil Corporation provided some of the funding for these mock jury simulations. There was, however, no control over the research or its conclusions. As Professor Sunstein states in his preface to a forthcoming book collecting summaries of the various studies in one volume:

> [The authors] are especially grateful for the respect shown, at each and every stage, for the complete independence of the academic enterprise. The data here, as well as the opinions we have expressed, are the property of the authors, and those who helped fund the research exercised no control, explicit or implicit, over its contents.

Cass R. Sunstein, et al., *Punitive Damages: How Juries Decide* (Univ. of Chicago Press, forthcoming 2001).

Their conclusions: given the open-ended nature of the punishment-setting task and natural features of human cognition that influence most jurors' approaches to it, even the most conscientious and well-intentioned juries will produce erratic and unpredictable dollar awards.

The starting point of the analysis is a pair of groundbreaking studies by Professors Sunstein, Kahneman and Schkade evaluating whether different juries presented with identical punitive damage scenarios would assess comparable dollar punishments. In the first study,[9] the researchers provided 899 jury-eligible citizens with scenarios describing ten personal injury scenarios of varying degrees of reprehensibility. They asked the mock jurors to rank the scenarios on a bounded scale of one to six, by both degree of outrageousness (*i.e.*, a scale of 0 = "not at all outrageous" to 6 = "absolutely outrageous") and severity of punishment that should be imposed (*i.e.*, a scale of 0 = "no punishment" to 6 = "extremely severe punishment"), and then to specify the dollar punishment the defendant should have to pay.[10]

The results were striking in several respects. Jurors showed remarkable consistency – cutting across differences in gender, race, age and education – in ranking on bounded scales both the comparative outrageousness of misconduct

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[9] Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998) ("*Assessing Punitive Damages*"). A technical version of the same study, with more detailed statistical analysis, is reported in Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. Risk & Uncertainty 49 (1998).

[10] As part of each scenario, the mock jurors were also provided information about the compensatory damages (in all cases $200,000) and the size of the defendant, and were given standard jury instructions explaining the punitive and deterrent purposes of punitive damages. *See Assessing Punitive Damages*, 107 Yale L.J. at 2146-47.

and the relative severity of punishment they believed should be imposed. The researchers conclude from this finding that moral judgments about misconduct (at least in the personal injury field) are widely shared.[11] But when it came to translating those shared moral judgments into dollar punitive awards, the consensus broke down. Dollar awards for identical scenarios involving identical harm and identical defendants were enormously variable and unpredictable. *See Assessing Punitive Damages*, 107 Yale L.J. at 2100-2103.[12]

The researchers classify this inability to translate shared outrage into consistent dollar awards as an instance of the commonly observed cognitive problem of "magnitude scal-

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[11] This is not to say that jurors perform well in determining whether conduct they would rank as blameworthy passes the *legal* threshold for punitive damages. The results of another large scale mock jury study conducted by Professors Hastie, Schkade and Payne show that at least in the area of non-intentional torts – where the law generally allows punitive damages for negligent conduct only if it rises to the level of "recklessness" – jurors had great difficulty deciding the liability issues correctly. Professor Hastie and his colleagues asked over 120 randomly-selected mock juries to decide liability for punitive damages in case scenarios drawn from decisions in which appellate courts had held that as a matter of law the facts did not show the recklessness that would permit a punitive damages award. Over sixty-seven percent of the mock juries nevertheless would have awarded punitive damages on the very same facts. *See* Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287 (1998). Juries showed poor comprehension of jury instructions carefully delineating the legally-established recklessness/negligence distinction and substituted their own (incorrect) intuitions instead. *Id.*

[12] The researchers also found (as real-world experience confirms) that jurors returned significantly higher dollar punitive awards against larger companies than they did against smaller ones. *See Assessing Punitive Damages*, 107 Yale L.J. at 2105. Their more important finding, however, was that different jurors made enormously variable punitive damages awards against the *same* defendants, regardless of size, in the *same* cases.

ing without a modulus." *Id.* at 2106-07. In substance, jurors lack a reference point (or "modulus") that would enable them coherently to map commonly shared moral judgments about outrageousness and appropriate severity of punishment onto an unbounded dollar scale. Erratic and unpredictable dollar awards naturally follow.

A follow-on study by Sunstein, Kahneman and Schkade carried the same experiment forward to deliberating juries.[13] Instead of asking 899 mock jurors to rank scenarios and assign dollar punitive awards individually, this study asked approximately 3000 mock jurors to perform the task first individually and then as members of approximately 500 deliberating juries. The researchers hoped to determine whether the process of jury deliberation would moderate the variability of dollar punitive awards determined by jurors individually.

This second study produced results even more striking than the first. The results for individual jurors replicated (and thereby validated) the earlier results. Contrary to commonly-held expectations, however, the process of jury deliberation did not moderate the problem of variable dollar punitive awards, but significantly *exacerbated* it. Deliberating juries produced dollar awards significantly *higher* than the awards that their members would have imposed individually, especially at the high end. The deliberative process thus produced a "severity shift" that substantially increased both the magnitude and the unpredictability of dollar punitive awards. *Deliberating About Dollars*, 100 Colum. L. Rev. at 1155-60. The researchers hypothesize that this severity shift comes about because arguing in deliberations for higher dollar awards (on an unbounded scale) is inherently easier than arguing for lower awards (constrained at zero). *Id.* at 1160-

[13] David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139 (2000) ("*Deliberating About Dollars*").

62. Whatever the cause, however, the data make plain that deliberation makes the problem of erratic and unpredictable punitive damage awards worse, not better.[14]

The results of these two studies have many important implications on many levels, but one point deserves emphasis. The results clearly show the fallacy of claims by retributive theorists that dollar punitive awards meaningfully quantify "community outrage" against corporate misconduct.[15] Juries might accurately convey community outrage if asked to rank the outrageousness of misconduct on a bounded scale, but since they cannot translate such shared outrage into predictable dollar awards, their dollar awards cannot reliably measure community sentiment. *See Assessing Punitive Damages*, 107 Yale L.J. at 2105-06.

B. Jury Awards Do Not, and Cannot, Reflect Any Coherent Theory of Deterrence.

The core justification for punitive damages has always

[14] The results of this study, and the earlier study, also show the fallacy of a recent contention, ostensibly based on regression analysis of the logarithms of compensatory and punitive damage awards made in decided cases, that punitive damages are reasonably predictable based on the amount of compensatory damages awarded. *See* Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997). The experimental data show overwhelmingly that dollar punitive awards vary widely even in identical cases involving identical harms. And when punitive awards are measured in real dollars rather than logarithmic dollars, similarly wide variations appear in real-world cases involving similar conduct and similar harms. *Deliberating About Dollars*, 100 Colum. L. Rev. at 1146 n.31. *See also* A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. Legal Stud. 663, 671-74 (1997); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 384-87 (1998).

[15] *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993).

been the need to deter blameworthy conduct. *See BMW*, 517 U.S. at 568; *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Haslip*, 499 U.S. at 22. The enormous variability of the dollar punitive awards assessed against identical defendants in identical cases belies any suggestion that juries in the ordinary course attempt to implement coherent deterrence theories. *Assessing Punitive Damages*, 107 Yale L. J. at 2111-12. The experimental results do not rule out, of course, that juries in other settings might focus more systematically on deterrence if encouraged to do so. But additional recent studies by Professors Sunstein, Kahneman and Schkade and Professor Viscusi cast serious doubt on whether in fact they ever would.

Under the law-and-economics theory of deterrence, punitive damages should be awarded only if the defendant has a chance of escaping liability. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998) ("*Economic Analysis*"). For optimal deterrence (*i.e.*, avoidance of overdeterrence),[16] punitive damages should equal the harm the defendant causes multiplied by the reciprocal of the probability that the defendant would not escape liability, less compensatory damages. *Id.*; *see also BMW*, 517 U.S. at 582 (noting that a higher ratio of punitives to compensatories may be justified where injury is hard to detect); *id.* at 592-93

[16] Overdeterrence is socially undesirable. Among other things, it leads to inefficient resource allocation, inducing companies to spend significantly more on precautions than the risk of harm would justify. Overdeterrence also stifles innovation, discouraging companies from undertaking risky activities, even when potential benefits would substantially outweigh potential costs. *See Economic Analysis*, 111 Harv. L. Rev. at 879-883; W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 299-327 (1998) ("*Social Costs of Punitive Damages*").

(Breyer, J., concurring) (discussing economic deterrence theory).

In a two-part study designed to assess attitudes about economic deterrence theory,[17] Professors Sunstein, Kahneman and Schkade asked mock jurors to assess punitive damages in personal injury scenarios in which probability of detection – the key variable from the standpoint of optimal deterrence – was varied dramatically. Changes in the probability of detection had no impact on jurors' awards, suggesting that jurors do not spontaneously factor optimal deterrence considerations into their judgments about appropriate punishment. In the second part of their study, the researchers asked law students trained in economic deterrence theory to agree or disagree whether, as that theory would suggest, a tort victim severely injured by egregious misconduct should be barred from recovering punitive damages because the tortfeasor had no chance of escaping detection. The great majority disagreed, suggesting that people may readily reject optimal deterrence considerations in the face of countervailing motivations – such as the desire to punish blameworthy conduct.

Professor Viscusi's study[18] tested jurors' ability to implement economic deterrence theory using model jury instructions proposed for that purpose by Professors Polinsky and Shavell. *See Economic Analysis*, 111 Harv. L. Rev. at 957-62. The results showed that even with explicit instructions, jurors had difficulty applying the theory correctly and proved insensitive to variables that should have made a difference in its application. Again, the data support the con-

[17] Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. Legal. Stud. 237 (2000).

[18] W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics* (working paper on file with Harvard John M. Olin Center for Law, Economics, and Business, www.law.harvard.edu/programs/olin_center/) (2000)

clusion that erratic and unpredictable jury-imposed punitive damage awards do not reflect any coherent deterrence theory.

C. Jury Punitive Damage Awards Are Inherently Subject to Arbitrary and Improper Influences.

A final important point from the Sunstein, Kahneman and Schkade studies is that the absence of reliable reference points for translating shared outrage into dollar punitive awards increases the likelihood that arbitrary "anchoring" effects and biases of various kinds will distort jurors' awards. Anchoring refers to the natural judgmental process of selecting an initial value (the "anchor") as a starting point from which to arrive at an award by a process of adjustment. Behavioral research shows that the values selected as the anchors often have a disproportionate influence on the outcome of the decision.[19] In the case of punitive damage decisions, which require jurors to map qualitative moral judgments to an unbounded dollar scale with no "modulus," the risk that arbitrary values selected as anchors will distort awards is particularly high. *See Assessing Punitive Damages*, 107 Yale L.J. at 2109-2110.

A study by Professors Hastie, Schkade and Payne demonstrates that this problem is very real.[20] The researchers pre-

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[19] *See* John W. Payne, et al., *Behavioral Decision Research: An Overview* 303-59 (1997) (reviewing behavioral literature on anchoring effects); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (discussing anchoring effect of plaintiff's *ad damnum* clause on compensatory awards).

[20] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 Law & Hum. Behav. 445 (1999) ("*Effects of Plaintiff's Requests and Plaintiff's Identity*").

sented 174 mock jurors with punitive damages scenarios involving a chemical spill which disrupted a plaintiff's riverside business. To test the potential influence of arbitrary anchor effects, the researchers varied only the dollar amount of punitive damages requested in closing argument by the plaintiff's counsel, holding all other factors (nature of misconduct, amount of harm, size of defendant, etc.) constant. The results showed that the dollar award requested in counsel's argument dramatically influenced the size of the awards jurors actually made, with the median award rising roughly in proportion to the increase in magnitude of the lawyer's request. *See Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 463.

Professor Viscusi observed similar anchoring effects in his study testing jurors' ability to assess punitive damages in accordance with instructions on how to compute optimal deterrence values (*see* n.18, *supra*). Jurors' awards increased substantially when case scenarios included a dollar punitive amount requested by plaintiff's counsel, to the detriment of the deterrence computations the instructions sought to encourage.

The anchor study by Professors Hastie, Schkade and Payne also tested for another source of arbitrariness in punitive damage awards – bias favoring local plaintiffs. Here the researchers held all factors in the chemical spill scenario constant except the identity of the plaintiff. In one version they identified the plaintiff as a locally-owned corporation; in the other the plaintiff became a division of a geographically remote corporation. Mock jurors awarded much higher punitive damages to local plaintiffs, even though the defendant, the misconduct and the harm were the same in all cases. *See Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 449, 466.

Additional studies led by Professors Hastie and Viscusi have identified numerous additional cognitive biases that dis-

tort punitive damage awards. Another study by Professors Hastie, Schkade and Payne,[21] for example, shows that juries assessing punitive damages exhibit severe hindsight bias in evaluating the *ex ante* foreseeability of conduct leading to accidents blamed on recklessness. The failure to take precautions that most jurors thought not necessary *ex ante* was deemed reckless by most jurors considering the same facts *ex post*. Such hindsight effects are common in the behavioral literature,[22] but appear particularly troublesome in the punitive damages setting. While this type of cognitive bias most directly affects punitive damage liability decisions, it potentially may distort determination of dollar punitive awards as well, by skewing reprehensibility determinations.

Professor Viscusi's work has focused principally on measuring jury attitudes about risk. It shows that typical jurors harbor many irrational beliefs about risk that distort punitive awards. Among other things, jurors systematically overestimate small probabilities and underestimate large ones, producing exaggerated blame for unlikely accidents and incoherence in judgments under uncertainty.[23]

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[21] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 Law & Hum. Behav. 597 (1999).

[22] *See, e.g.*, Susan J. Labine & Gary Labine, *Determinations of Negligence and the Hindsight Bias*, 20 Law & Hum. Behav. 501 (1996); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 Law & Hum. Behav. 89 (1995).

[23] Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 Ariz. L. Rev. 901 (1998); *Social Costs of Punitive Damages*, 87 Geo. L.J. at 327-32 (1998); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, (working paper on file with Harvard John M. Olin Center for Law, Economics, and Business, www.law.harvard.edu/programs/olin_center/) (Journal of Legal Studies, forthcoming 2001).

Perhaps the most striking anomaly found by Professor Viscusi on this topic concerns jury attitudes towards corporate cost-benefit analyses of potential safety precautions. In a 500-person mock jury study designed to test the impact of cost-benefit analysis on the size of punitive awards,[24] he found that jurors awarded much higher punitive damages against companies that undertook cost-benefit analyses than against companies that did not. And when the companies that performed the cost-benefit analyses were liberal in their valuation of potential risks – leading them to take greater precautions – jurors punished them more severely than companies that had underestimated the same risks.

Significantly, Professor Viscusi has also found that judges tend to be significantly more rational than jurors in their evaluation of risk. In a survey of nearly 100 judges designed to test judges' susceptibility to the same sorts of cognitive biases that skew juror attitudes about risk,[25] judges, being human, naturally exhibited some of the same biases (such as hindsight bias), but to a lesser degree. No doubt due to their experience and training, judges did a much better job than jurors of putting aside potential biases that might affect their decisions about risk.

II. NON-DEFERENTIAL JUDICIAL REVIEW AT BOTH THE TRIAL AND APPELLATE LEVELS IS ESSENTIAL TO ENSURE THAT PUNITIVE DAMAGES DO NOT EXCEED DUE PROCESS LIMITS

The empirical studies discussed in the preceding section strongly reinforce this Court's conclusion in *Honda* that

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[24] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000).

[25] W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 Am. Law & Econ. Rev. 26 (1999).

meaningful judicial review of the size of punitive damage awards is essential to protect defendants against "lawless, biased, or arbitrary verdict[s]." 512 U.S. at 433. As the studies show, dollar punitive awards made by juries are erratic and unpredictable, unconstrained by either community views of appropriate dollar punishment or coherent deterrence theories, and highly susceptible to arbitrary anchor effects and cognitive biases. It follows that both "fair notice of ... the severity of the penalty that ... may [be] impose[d]," *BMW*, 517 U.S. at 574, and "uniform general treatment of similarly situated persons," *id.* at 587 (Breyer, J., concurring), depend critically on the presence of additional procedures that "assure 'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit 'appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* (quoting *Haslip*, 499 U.S. at 20-21).

Juries assessing punitive damages do so as one-time decisionmakers in isolated cases. Constitutional review under *BMW*, by contrast, properly requires evaluation of their awards in a much broader context. Under the "reprehensibility" guidepost, courts must compare the blameworthiness of misconduct in question with that of other punishable conduct, not before the jury, for purposes of gauging whether substantial punitive damages are justifiable. 517 U.S. at 575-80. Under the "ratio" guidepost, courts must assess the reasonableness of the punitive award in relation to the actual or likely harm from the misconduct, again drawing on comparisons with other cases and consideration of factors (such as likelihood of detection) that might make a higher or lower ratio reasonable. *Id.* at 580-83. And under the "sanctions for comparable misconduct" guidepost, courts must consider legislative judgments concerning the appropriate punishment – a measure of community views on dollar punishment both

more reliable and more legitimate than the erratic and unpredictable decisions of isolated juries. *Id.* at 583-85.

Rigorously and consistently applied, the *BMW* guideposts could help bring a measure of predictability to punitive damages that is now sorely lacking. Predictability will come, however, only with the development a meaningful body of appellate precedents to guide the interpretation and application of the guideposts at the trial court level. For that to happen, non-deferential review is required. As the Court recently held in an analogous context:

> [L]egal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.

Ornelas v. United States, 517 U.S. 690, 697 (1996).

Appellate courts are equally as competent as trial courts to undertake the constitutional analysis *BMW* requires (and which this Court, of course, itself undertook in *BMW*). A policy of sweeping deference – such as that applied by the Ninth Circuit in this case – is an abdication of responsibility to enforce the constitution.

CONCLUSION

For all the reasons stated above, the decision of the Ninth Circuit should be reversed and remanded with the instructions that the appellate court should conduct a searching and non-deferential review of the constitutionality of the underlying punitive award.

Respectfully submitted,

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